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Supreme Court, U.S.
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No. 04-1260

In the Supreme Court of the United States

CITY OF PORTLAND, OREGON,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER, CITY OF PORTLAND, OREGON

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QUESTIONS PRESENTED

The Telecommunications Act of 1996, 47 U.S.C. § 253(a), provides that "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Because Qwest failed to make any showing that it was effectively prohibited from providing telecommunications services, the United States District Court for the District of Oregon granted summary judgment to the City of Portland and Intervenor-Cities on Qwest's claim that the cities' regulations and requirements were preempted by § 253(a). The Ninth Circuit remanded the case, concluding that Qwest was not required to make "an actual showing" of an effective prohibition because local regulations and requirements should be preempted if they "*may*" prohibit the provision telecommunications services.

The question presented is

Whether Section 253(a) allows a telecommunications entity to seek preemption of local government regulations without requiring an *actual* showing that it has been prohibited, or effectively prohibited, from providing telecommunications services.

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INTEREST OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interest of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. Letters consenting to the filing of this brief are on file with the Clerk.

for telecommunications policies and services in local governments throughout the country.

The National League of Cities is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States cities, villages, and towns and more than 135,000 local elected officials. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The streets of the City of Portland ("City" or "Portland"), like the streets and rights of way of cities, towns, and counties throughout the Nation, must accommodate competing uses. In addition to the commonly recognized uses of pedestrian and vehicular traffic, public rights of way accommodate a variety of infrastructure needs including traffic signals and lighting and related equipment. Public rights of way are also used to locate a variety of utility service lines such as water and sewer, power, natural gas lines, and telecommunication facilities, including cable and phone lines. Local governments of all sizes use franchising processes as one means of accommodating these competing uses in the most efficient way possible and as a way to recoup compensation for allowing the use of public property entrusted to their care. Because the regulation of public rights of way affects thousands of local governments throughout the United States, the *amici* have a significant interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

This case raises important, recurring questions relating to the preemptive scope of § 253(a) of the Telecommunications Act of 1996. In particular, the case asks whether a telecommunications provider can survive summary judgment and can continue to litigate a claim to preempt local laws and regulations in spite of evidence no prohibition or effective prohibition occurred. The Ninth Circuit's decision answers this question affirmatively. However, this holding conflicts with this Court's preemption and summary judgment decisions. In addition, the Ninth Circuit's decision conflicts directly with decisions of other federal circuit courts of appeal and with decisions of the Federal Communications Commission, the agency charged with interpreting the Telecommunications Act of 1996.

By enacting the Telecommunications Act of 1996, Congress intended to foster the rapid deployment of telecommunications service. H.R. Conf. Rep. No. 104-458, at 113, *reprinted* in 1996 U.S.C.C.A.N. 124. However, Congress also recognized the importance of balancing this desire with the continued need to allow local governments to maintain control over property which the public has entrusted them to manage. *See*, 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein). Congress did not intend to completely preempt every local government regulation and the courts have not interpreted the Telecommunications Act of 1996 as a statute of "complete preemption." *See Marcus v. AT&T Corp.*, 138 F.3d 46, 53 (2d Cir. 1998), *City of Rome, New York v. Verizon Communications Inc.*, 362 F.3d 168, 174 (2d Cir. 2004). In addition, the text of § 253 itself makes clear that not every local regulation is preempted, but only those which prohibit or effectively prohibit the provision of telecommunications

services. The extent of the 253's preemption and how to apply that preemption to local government regulations has caused disagreement in the lower courts.

In this case, while renegotiating its franchise with the City, Qwest filed suit in federal court, alleging Portland's franchise process violated § 253. The parties filed cross-motions for summary judgment, with the City presenting evidence that its franchise requirements do not prohibit or have the effect of prohibiting the provision of telecommunications services. The City presented evidence that Qwest had provided service and was continuing to provide service under the very terms and conditions to which Qwest objected. The City also showed that Qwest provides the same telecommunications services in Portland as in its other service areas. When asked, Qwest was not able to identify a single telecommunications service which it was prohibited from providing. Qwest admitted that it was speculative whether Portland's regulations had any prohibitory effect. The district court therefore held, "If the challenged requirements do not prohibit or have the effect of prohibiting the ability of an entity to provide a telecommunications service, § 253 does not preempt the requirements and the court's inquiry is complete." Pet. App. at 26.

Qwest appealed the district court's ruling and the Ninth Circuit reversed and remanded, holding in part that Qwest was not required to make an actual showing that it was prohibited or effectively prohibited from providing telecommunications service. The Ninth Circuit held "regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted." Pet. App. at 10 (emphasis in the original). It therefore

remanded the case for further proceedings under this standard.

However, allowing the preemption of local regulations because they might, someday, in a hypothetical case with hypothetical facts, lead to the prohibition of telecommunications services must be in error for it conflicts with numerous holdings of this Court, as well as the holdings of other federal courts of appeal. By interpreting § 253 to allow a cause of action, and to allow continued litigation through the reversal of a grant of summary judgment, where there "may" (in the future) be a prohibition, the Ninth Circuit runs afoul of this Court's decisions regarding preemption and summary judgment standards. Further, the Ninth Circuit decision conflicts with several decisions of other federal circuit courts of appeal and a state court. Lastly, the Ninth Circuit's decision is contrary to guidance promulgated by the Federal Communications Commission. These conflicts provide ample reason for the granting of Portland's petition for certiorari.

REASONS FOR GRANTING THE WRIT

This Court's rules provide that certiorari can be granted for one of three reasons. These reasons include where 1) there exists a conflict between this Court's precedents and the ruling of a lower court such as a federal appellate court or a state supreme court; 2) there exists a conflict between the ruling of a federal appellate court and another federal appellate court or a state's highest court; or 3) in instances where an important federal question is at stake. Each of these is met in this case.

I. CONFLICT WITH THIS COURT'S PRECEDENTS

The opinion of the Ninth Circuit conflicts with this Court's precedents in two significant regards. First, the Ninth Circuit's ruling ignores the fact that Qwest came forward with *no* evidence of an effective prohibition violating preemption precedents. Second, the Ninth Circuit's remand violates this Court's teachings that summary judgment cannot be survived on the basis of hypothetical and speculative facts.

A. Conflict with This Court's Preemption Principles

In determining the preemptive scope of a statute, this Court has noted that preemption analysis begins with the principle that preemption provisions are to be read narrowly, not broadly. *Gregory v. Ashcroft*, 501 US 452, 459-61 (1991). This principle exists out of respect for the authority of state and local governments to regulate areas that have traditionally been within their sphere of power. The narrow application of preemption is furthered by the proper assignment of burdens of proof in preemption cases: The burden of demonstrating preemption is on the party who asserts it. *See, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *De Canas v. Bica*, 424 U.S. 351 (1976).

A further example of this Court's preemption admonishments can be found in *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978), which presented a similar preemption issue. In *Exxon*, the appellants argued that compliance with a Maryland statute regulating gasoline stations *might* cause them to violate the Robinson-Patman Act. Therefore, Exxon argued the Maryland statute should be preempted. In finding preemption unwarranted, this Court stated "in other areas of coincident federal and state regulation, the 'teaching of this Court's

decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" 437 U.S. at 130, citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960), *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45 (1966). As this Court noted "the existence of such potential conflicts is entirely too speculative in the present posture of this case" to warrant preemption. 437 U.S. 130; *see also Seagram & Sons*, 384 U.S. at 46.

As is demonstrated above, those who assert preemption bear the burden of proof and cannot sustain that burden through speculation. Likewise, telecommunications providers asserting the preemption of local government regulations bear the burden of proving that § 253 preempts local regulation and cannot meet this burden without clear proof. The question then arises of how a telecommunications provider meets this burden.

If Congress had intended to completely preempt all local government regulation of telecommunications, mere recitation of Section 253(a)'s text might suffice to meet this burden. Alternatively, if this were a case where the local government regulation prohibited the provision of services on its face, then too, the recitation of § 253 and the text of the challenged regulation might suffice for the preemption analysis.

Because the Telecommunications Act does not completely preempt all state and local regulations, and because this is not a case about facial preemption, mere recitation of the text of the statute cannot suffice. The local regulations at issue here can be preempted only to the extent they "have the effect" of prohibiting the provision of services, therefore facts and evidence must be ascertained and submitted to support a finding of preemption. The burden of proof however, does

not shift from the party asserting preemption. The burden of proof rests with Qwest.

However, Qwest provided no evidence that it was in any way prohibited from providing any service. Because it did not provide any proof that Portland's regulations actually conflict with the stated purposes of § 253, Qwest did not meet its burden with respect to establishing the preemption of Portland's regulations. Thus, § 253 did not preempt those requirements, and the district court's inquiry properly ended with summary judgment in favor of Portland and the intervening cities. However, under the Ninth Circuit's broad interpretation of § 253(a), virtually all local government regulations are preempted. The Ninth Circuit opinion fails to follow this Court's admonishments that preemption be applied narrowly, with respect given to federalism principles, and with the burden of proof lying with the party asserting preemption. The Ninth Circuit should be reversed on that ground alone.

B. Conflict with Summary Judgment Principles

As established above, the party asserting preemption bears the burden of proving that preemption is warranted. That legal principle is especially important in the context of this case, a summary judgment case. Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). To succeed, the moving party must show that the evidence admissible at trial is insufficient to meet the non-moving party's burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party has carried this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material

facts in question." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24. Parties filing or defending against a motion for summary judgment must supply the court with facts supporting the elements of their claims to survive the process. After both sides have the opportunity to supply supporting evidence, a court can rule on the summary judgment motion. Where evidence presented by the non-moving party in response to a summary judgment motion is insufficient "to establish ... an element essential" to its case, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322-23. The ultimate inquiry is whether a reasonable fact finder, drawing inferences in favor of the non-moving party, could find for the non-moving party based on the evidence presented with consideration given to the applicable burden of proof. *See*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Therefore, to succeed on a motion for summary judgment asserting federal preemption, a telecommunications provider must come forward with facts sustaining the burden of proving a violation of Section 253 (a). In other words, a telecommunications provider must supply facts supporting an allegation that it has somehow been prohibited or effectively prohibited from providing a telecommunications service. A local government would then have to supply evidence to the contrary to avoid entry of summary judgment against it.

Conversely, for a local government to succeed on a motion for summary judgment, it would show that a telecommunications provider is not prohibited or effectively prohibited from providing telecommunications services. To

survive a summary judgment motion asserting that local regulations do not prohibit the provision of services, a telecommunications provider must counter local government evidence that no prohibition exists.

Here, the evidence presented by Portland, and the intervening cities, showed there was no prohibition or effective prohibition, on the provision of telecommunications services. Qwest offered no material facts to the contrary. To succeed on its motion for summary judgment or survive Portland's motion, Qwest was at least required to come forward with some evidence that it was effectively prohibited from providing telecommunications service. It failed to meet this burden. Nonetheless, the Ninth Circuit held that Qwest need not come forward with evidence of actual prohibition. Pet. App. at 10. Like Exxon, however, Qwest cannot rely on speculation to succeed on a claim seeking to preempt a local government regulation. *Exxon Corporation*, 437 U.S. 117 at 130 (speculation of conflicts does not warrant preemption).

By holding that Qwest need not make an actual showing that it has been effectively prohibited from providing telecommunications service, the Ninth Circuit's ruling turns this Court's summary judgment precedents on their heads. The ruling allows Qwest and other telecommunications providers to survive motions for summary judgment despite bringing forth no evidence establishing the elements of the claims on which *they* bear the burden of proof at trial. The Ninth Circuit ruling allows Qwest to rely on exactly the "metaphysical doubt" which this Court clearly states is insufficient to survive summary judgment. *See*, *Matsushita*, 475 U.S. at 586.

To allow a preemption case to be pursued on the "may" (someday in the future) theory created by the Ninth Circuit is

inconsistent with the purposes of summary judgment and explicitly contrary to this Court's preemption and summary judgment rulings. The Ninth Circuit's declaration that an actual showing of prohibition is not required violates federalism principles, directly conflicts with this Court's precedents, and makes this case worthy of certiorari.

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH OTHER LOWER COURT DECISIONS

In addition to conflicting with this Court's precedents, the opinion of the Ninth Circuit conflicts with the opinions of the Third and Eleventh Circuits. The Ninth Circuit's opinion also conflicts with the Federal Communications Commissions ("FCC") requirements in preemption cases.

A. Conflicts with Other Federal Circuit Courts

As noted above, this Court has held the burden of proof in this factual inquiry rests with the party asserting preemption, in this case, Qwest. Other circuit courts of appeals have followed this established reasoning and as a result the Ninth Circuit's decision has created a circuit split on this issue with respect to § 253. For instance, in *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241 (3d Cir. 2002), the Third Circuit held the party seeking preemption the bears burden of showing that a local regulation prohibits or effectively prohibits the provision of telecommunications service. To meet this burden, telecommunications providers must come forward with facts establishing that local regulations have the effect of prohibiting the provision telecommunications service. *Id.*

The Eleventh Circuit reached a similar result in *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d

1169, 1188 (11th Cir. 2000), concluding that if a party asserting preemption fails to make the threshold showing of a violation of § 253(a), the safe harbor provisions need not be reached. Under the Ninth Circuit's reading, § 253 essentially becomes a complete preemption of any local regulation of telecommunications services, which is not consistent with the statutory language. As noted by the Eleventh Circuit, this result cannot be correct. "[I]f we read [§ 253] (b) and (c) as delineating the absolute boundaries of state and local regulatory authority in the field of telecommunications, the *limitation* set forth in subsection (a) would be superfluous." *Id.* (emphasis added). The "limitation" noted by the Eleventh Circuit is the fact that only those regulations which prohibit or effectively prohibit the provision of services are preempted.

In addition, at least one state court has held that telecommunications providers must provide evidence of a prohibition. "[The providers'] argument presumes that the only legitimate regulatory domain of local governments is the control of rights-of-way, a presumption that cannot be squared with the language of the statute. . . ." *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1048 (Or. App. 2001), *cert. denied*, 52 P.3d 1056 (Or. 2002) (Table).[2]

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[2] Amici acknowledge that this Court requires a decision be rendered by the highest state court in which a decision could be had. The intermediate appellate court in *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1048 (Or. App. 2001), *cert. denied*, 52 P.3d 1056 (Or. 2002)(Table), is the highest state court in which a decision could be had as the Oregon Supreme Court declined to exercise its jurisdiction in the case. *See, Sullivan v. Texas*, 207 U.S. 416 (1908). *See, generally*, ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO &

Lastly, by allowing the preemption of local regulations which may (someday, in the future) have a prohibitory effect, the Ninth Circuit also creates a circuit split with respect to the proper standards for summary judgment grants. The First Circuit has specifically stated a non-moving party may not defeat a summary judgment motion merely by relying on "conclusory allegations, improbable inferences, and unsupported speculation." *Pagano v. Frank*, 983 F.3d 343, 347 (1st Cir. 1993). The Ninth Circuit opinion allows just that in § 253 cases: Qwest has been able to defeat Portland's motion for summary judgment with nothing but "conclusory allegations, improbable inferences, and unsupported speculation." The *amici* respectfully request that this Court grant certiorari to clarify that even in the context of § 253, a summary judgment motion cannot be defeated on those grounds.

B. Conflicts with the FCC

The FCC, the agency charged with interpreting the Telecommunications Act of 1996, offers guidance on the issue of evidentiary burdens to be met before local government ordinances may be preempted. The guidance is remarkably similar to the standards required of summary judgment motions. The FCC issued guidelines detailing the type of evidence which should be provided to support petitions for preemption under § 253, noting specifically that "factual allegations should be supported by credible evidence, including affidavits, and, where appropriate, studies or other descriptions of the economic effects of the legal requirement that is the subject of the petition." Suggested Guidelines for

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KENNETH S. GELLER, SUPREME COURT PRACTICE, 141-144 (8th ed., BNA Books 2002).

Petitions for Ruling Under § 253 of the Communications Act, 13 F.C.C.R. 22,970; 22,971-72 (1998). The FCC has refused to find a violation of § 253 (a) when it has not been presented with credible and probative evidence supporting preemption. *See In the Matter of California Payphone Association*, 12 F.C.C.R. 14,191; 14,203-05 (1997); *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396; 21,440 (1997); *In the Matter of American Communications Services, Inc., MCI Telecommunications Corp.*, 14 F.C.C.R. 21,579; 21,299 (1999). Just as the Ninth Circuit's opinion is contrary to the holdings of other courts of appeal and state courts, so too is it contrary to the holdings of the FCC on similar matters. The *amici* therefore request that this Court grant the City's petition for certiorari.

III. THE IMPORTANCE OF THE FEDERAL QUESTION

The proper framework for determining preemption under § 253 implicates the rights and responsibilities of every telecommunications provider and every municipality in the country. The importance of the question at issue in this case was noted some five years ago by the Eleventh Circuit: "As has been observed by other federal courts, the language and structure of § 253 raises two difficult questions of statutory interpretation: (1) *what is the preemptive scope of § 253*; and (2) who may seek enforcement of the provisions of § 253?" *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2000) (emphasis added). The preemptive scope of § 253 continues to be an active question for telecommunications companies and local governments, and is worthy of this Court's attention. This case presents a clear record for this Court to be able to answer the question of the preemptive scope of § 253. The *amici* therefore request that this Court grant the Portland's petition because of the importance of the federal issue.

CONCLUSION

Cities must to be able to franchise the use of their rights of way to protect the public's interest in public property. While the Telecommunications Act's purpose was to assist in the rapid deployment of telecommunications services, Congress also contemplated a continued role for local government authority over public property. That role, and the federalism principles behind Congress' decision, have been significantly diminished by the Ninth Circuit's decision. Local governments have litigated numerous cases to protect the public's interest in the efficient use of public rights of way. As telecommunications services continue to be deployed in the Nation's communities, confusion in this area will lead to an increase in litigation over the use of rights of way, frustrating Congress' goal of rapid deployment.

For these reasons, the *amici* respectfully urge this Court to grant the City of Portland's petition for certiorari.

Respectfully submitted,

Henry W. Underhill, Jr.